



**The Comptroller General  
of the United States**

Washington, D.C. 20548

*Springfield 81-2*

## Decision

**Matter of:** Stephan Wood Products Inc.

**File:** B-225631

**Date:** April 1, 1987

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### DIGEST

1. Where record shows that contracting officer reasonably relied upon preaward survey in finding bidder to be responsible, there is no basis for concluding that affirmative responsibility determination of contracting officer was made in bad faith.

2. General Accounting Office (GAO) will not consider protests that another bidder does not qualify as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, since the agency determination concerning the status of a bidder under that act is subject to review by the Small Business Administration (SBA) (where a small business is involved) or the Department of Labor. Where the agency has not referred protester's continued disagreement with small business firm's Walsh-Healey Act status to the SBA for its determination, despite being promptly apprised of the disagreement, the agency should now refer matter to SBA as required by the Federal Acquisition Regulation.

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### DECISION

Stephan Wood Products Inc. protests on January 13, 1987, the proposed award under invitation for bids (IFB) No. DLA700-86-B-0947 to Anderson Manufacturing Company by the Defense Construction Supply Center (DCSC), Columbus, Ohio, for vertical bow staves. Stephan alleges that Anderson is not a responsible contractor, inasmuch as it does not have the equipment, expertise or financial capability to manufacture this product. Stephan also claims that Anderson does not qualify as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), and thus is ineligible for award.

We dismiss the protest in part and deny the remainder.

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The agency argues that Stephan's protest should be dismissed under section 21.1(d) of our Bid Protest Regulations because the contracting officer only received a copy of the protest on January 21, 1987, more than 1 day after it was filed with our Office. However, the agency did not raise this matter until it submitted its report on the merits of the protest, and its report was timely filed within 25 working days. Therefore, we decline to dismiss the protest on this basis. See Allied Maritime Management Organization, Inc., B-222918, B-222918.2, Aug. 26, 1986, 86-2 C.P.D. ¶ 227.

Stephan challenges DCSC's determination that Anderson is a responsible contractor and claims that this determination was based upon Anderson's fraudulent representations and the government's "blind" bad faith acceptance of these misrepresentations. Our Office will not take exception to an affirmative determination of contractor responsibility unless the protester makes a showing of fraud or bad faith on the part of the procuring officials. 4 C.F.R. § 21.3(f)(5) (1986); Information Systems & Networks Corp., B-218642, July 3, 1985, 85-2 C.P.D. ¶ 25. To make this showing the protester has a heavy burden of proof; it must demonstrate by virtually irrefutable proof that procuring officials had a specific and malicious intent to injure the protester. Gayston Corp.-- Request for Reconsideration, B-223090.2, July 25, 1986, 86-2 C.P.D. ¶ 115; Information Systems & Networks Corp., B-218642, supra.

Stephan has made no such showing. In making her affirmative responsibility determination, the contracting officer primarily relied upon a preaward survey by the Defense Contract Administration Services Region, Dayton, Ohio, recommending award to Anderson. This survey documented that Anderson had adequate available equipment, and technical and production capability to manufacture the vertical bow staves, which are very simple to produce. The survey also showed that although Anderson was inexcusably delinquent on some recent contracts due to inadequate production personnel, it has added new employees and current contracts are on schedule. Moreover, a detailed financial analysis was made of Anderson, which confirmed that it had the financial resources to perform this contract.

Stephan offered evidence allegedly showing that Anderson does not have the requisite experience, equipment or financial resources to perform this contract, based, in the main, on Anderson's past performance and disputing the finding of the preaward survey.

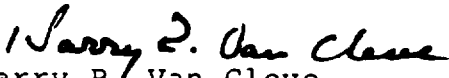
The record indicates that the contracting officer considered this information, but that she found the specific findings and recommendation of the preaward survey supported an

affirmative responsibility determination for Anderson. In this regard, the well documented preaward survey showed that Anderson had taken steps to cure its past performance problems and had improved its financial position. Moreover, the bow staves were found to be very simple to produce. Thus, the record indicates that the contracting officer reasonably could rely on the preaward survey, and we find that Stephan has not demonstrated that the contracting officer's determination that Anderson is responsible was made in bad faith. This basis of protest is denied.

With regard to Stephan's protest of Anderson's Walsh-Healey Act status, our Office will not consider protests alleging that another bidder does not qualify as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, since the agency's determination concerning the status of a bidder under the act is by law subject to review by the Small Business Administration (SBA) (where a small business is involved) or the Department of Labor. 4 C.F.R. § 21.3(f)(9); California Mobile Communications, B-224398, Aug. 29, 1986, 86-2 C.P.D. ¶ 244. Therefore, this protest basis is dismissed.

However, the record shows that DCSC has not referred Stephan's protest of Anderson's eligibility under the Walsh-Healey Act to the SBA. Since DCSC was promptly apprised that Stephan disagreed with the contracting officer's determination that Anderson was a manufacturer, DCSC should now refer the matter to the SBA for its determination as required by the Federal Acquisition Regulation, 48 C.F.R. § 22.608-3(b)(2) (1986). We are so advising the agency.

We dismiss the protest in part and deny the remainder.

  
Harry R. Van Cleve  
General Counsel